Supreme Court, U.S.
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No. 92-956

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF NEW YORK,

Petitioner,

vs.

JAMES WALKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly hold that the specific factual allegations set forth in Respondent's complaint state a claim under 42 U.S.C. § 1983?

2. Did the Court of Appeals properly conclude that the Kings County District Attorney acted as a City policymaker under the facts of this case?

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 1971, a New York City Police Detective and prosecutors from the Kings County District Attorney's Office got together to conceal material exculpatory evidence. Petitioner-respondent James Walker in consequence served nineteen years in prison for a felony murder he had nothing to do with. In 1990, having finally obtained the suppressed exculpatory evidence, Walker successfully moved to have his conviction vacated and the

underlying indictment dismissed. Complaint ¶¶ 22-29, 31-33, 36.[1]

The relevant facts, as set forth in Walker's complaint, are as follows:

On June 1, 1970, William Powell and at least one accomplice robbed an armored truck, murdered the driver and struck the guard, Jose Ruiz, with a sawed-off shotgun. Powell was arrested in mid-April 1971. He pled guilty to the murder in October 1971. Complaint ¶¶ 6-8, 14.

A purported eyewitness, John Snider, came forward in the fall of 1970. Snider was a long-term drug addict with a significant criminal record; he came forward only after a financial reward had been offered. Snider claimed that Walker and Walker's friend, Melvin Givens — both known to Snider from the neighborhood — had participated in the robbery/murder. Snider's word was, and remained, the only "evidence" that in any way implicated Walker. Complaint ¶¶ 10-12, 14.

On April 23, 1971, Walker was arrested by Detective Robert Powell of the New York City Police Department ("NYPD"). That evening Walker participated in a stationhouse lineup conducted by Kings County Assistant District Attorney J. Paul Zsuffa. The surviving victim, Ruiz, was present. Not only did Ruiz fail to identify Walker as his assailant; he affirmatively so identified a lineup participant other than Walker. Both Zsuffa and Det. Powell knew these facts; moreover, Zsuffa took a contemporaneous "Q&A" statement from Ruiz concerning the lineup. Complaint ¶¶ 16, 17.

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1. References to "Complaint ¶ __" are to Respondent's Amended Complaint (the "Complaint"), which is reprinted as Appendix A hereto.

Equally important, Zsuffa and Det. Powell had also learned by April 23 that Givens, the second man accused by Snider, might actually have been incarcerated on the date of the crime. Within a few days, the fact of Givens' crime-date incarceration was confirmed. Accordingly, as was then apparent, Givens could not have participated in the crime, and Snider's "eyewitness" account (and overall credibility) was completely discredited. Complaint ¶¶ 13, 18-20.

Nonetheless, Det. Powell, Zsuffa and other police and prosecutorial personnel determined to go forward with the case against Walker. In so doing, they committed and suborned perjury, and failed to turn over documents, in order to conceal from Walker, his attorney, the Kings County Grand Jury and the trial court (a) that Snider had falsely accused Givens, and (b) that Ruiz had identified someone other than Walker in the lineup. At Walker's October 1971 *Wade* hearing, Zsuffa falsely swore that the April 23 lineup had never taken place, and Det. Powell perjuriously denied any recollection of the lineup or awareness of lineup records. In addition, Snider's grand jury and trial testimony was crafted so as to omit all mention of Givens; and despite that omission, Det. Powell assured the trial jury that Snider's testimony was consistent with his Fall 1970 story. Complaint ¶¶ 22-29.

The police and prosecutorial misconduct at bar were a direct consequence of training and supervision deficiencies amounting to deliberate indifference on the part of New York City policy makers to the Constitutional rights of Walker and other citizens of the municipality. Complaint ¶¶ 36, 39-43.

In 1991, Walker sought redress by bringing this suit against the City pursuant to 42 U.S.C. § 1983 and New York State common law. On January 7, 1992, the United States District Court for the Southern District of New York issued a memorandum order and opinion dismissing Walker's federal claims with prejudice

pursuant to Fed. R. Civ. P. 12(b)(6). (25-33).[2] On September 4, 1992, the United States Court of Appeals for the Second Circuit reversed the District Court's order. (1-22).

REASONS FOR DENYING THE PETITION

I.

THE ALLEGATIONS OF THE COMPLAINT ARE SUFFICIENT EVEN UNDER A "HEIGHTENED" PLEADING RULE.

The task of a federal court reviewing the sufficiency of a complaint is necessarily a limited one. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Furthermore, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A § 1983 "failure to train" claim against a municipality must allege (as does Walker's complaint) that the municipality's training or supervision deficiencies were so egregious as to bespeak a "deliberate indifference" to constitutional rights. *See Canton v. Harris*, 489 U.S. 378, 389 (1989). There are, however, no special pleading rules for such claims. *Cf.* Rule 9(b), Fed. R. Civ. P. Accordingly, a complaint stating such a claim need only contain "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). *See also* Rule 80 and Forms 10, 14, Fed. R. Civ. P.

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2. Numerical references in parentheses refer to pages in the Appendix to the Petition for a Writ of Certiorari.

The "heightened" pleading requirement adopted by the Fifth Circuit in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir.), *cert. granted*, 112 S. Ct. 2989 (June 22, 1992), has no basis in the Federal Rules. If such a "heightened" pleading rule is to be imposed, it must be pursuant to the normal procedures for amendment of those Rules. *See* 28 U.S.C. §§ 2072-2074.

Even if a "heightened" pleading requirement could somehow be judicially imposed for the special benefit of municipal § 1983 defendants, however, Walker's complaint clearly would withstand dismissal. Accordingly, this is not an appropriate case for certiorari on the "heightening" issue.

A fair reading of the Complaint discloses that Walker's core "rights deprivation" allegations are those setting forth *Brady* violations on the part of Kings County ADAs. And, as to those central "District Attorney" *Brady* allegations,[3] the Complaint amply details circumstances amounting to actionable municipal "deliberate indifference". Thus, the pleading alleges:

> (a) that, at the time of Walker's trial, the District Attorney's Office "had *no* written policies, procedures or practice guides concerning . . . the prosecutor's duty to disclose exculpatory material," Complaint ¶ 39(e) (emphasis added);
>
> (b) that the District Attorney's Office, at the relevant time, had "*no* training program of any significance for incoming Assistant District Attorneys" and accordingly

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3. The Second Circuit held that Walker's "*police*" *Brady* allegations failed because the police have no obligation with respect to exculpatory evidence beyond disclosing it to the prosecutor. (14-15). Walker has cross-petitioned on this point.

"wantonly failed to appropriately train" the ADAs in question as to "their obligations to recognize and disclose exculpatory information", Complaint ¶ 39(d) (emphasis added);

(c) that the District Attorney's Office, at the time in question, had lacked "*any* system for active supervision of trial Assistants by competent supervisors (although the Office did ultimately institute such a system two years or more *after* Walker's trial), Complaint ¶ 39(f) (emphasis added);

(d) that the District Attorney's Office has itself acknowledged the critical need for "*Brady*" supervision of trial ADAs by adopting (*after* Walker's trial) a requirement that those ADAs consult with supervisors "as to the need to disclose exculpatory information", Complaint ¶ 39(g);

(e) that the District Attorney's Office at all relevant times "lacked any practice to review the quality of the job performance of Assistant District Attorneys in any fashion that would disclose [*Brady* violations]", Complaint ¶ 39(h);

(f) that the District Attorney's Office in 1971 was "an extremely high-volume operation which permitted Assistant District Attorneys to devote only a limited amount of time to any particular case", Complaint ¶ 39(i); and

(g) that the latter fact, "[a]s was obvious at the time, . . . made it all the more critical that Assistants receive proper training and supervision in such important matters as the need to recognize and disclose exculpatory information". *Id.*

Walker, in sum, alleged in great detail the substantial deficits in *Brady* training and supervision that led to his wrongful conviction. Nor was it necessary for Walker to plead the obvious facts (a) that the District Attorney knew "to a moral certainty that [his] ADAs [would] *acquire Brady* material" (18) (emphasis added), and (b) that their failure to produce such material to the defense could (as in this case) have very severe consequences. *Compare Canton, supra*, 489 U.S. at 390 & n. 10.

Accordingly, no "heightened" pleading requirement could reasonably be adopted that would find Walker's complaint insufficient. Indeed, the City itself conceded as much below: its 12(b)(6) motion made *no* "particularity" attack whatever against Walker's "District Attorney" allegations.[4]

Since Walker's complaint must be sustained on *any* reasonable pleading standard ("heightened" or otherwise), this is not a good case for the Court to take on the issue presented by the *Leatherman* case. For the same reason, this Court should deny the City's petition forthwith, rather than holding the case pending the *Leatherman* outcome.[5]

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4. While the City (successfully) argued to the district court that Walker's "*Police Department*" allegations failed on particularity grounds, the City's only challenge to Walker's "District Attorney" allegations was a *substantive* argument to the effect that the Kings County District Attorney was not a City policymaker. *See* Court of Appeals R. Nos. 13, 16 (City district court briefs), *passim*. The district court, however, failed to reach the latter argument, instead concluding *sua sponte* that Walker's "District Attorney" allegations, too, had not been pleaded with sufficient specificity (29, 32-33).

5. It is immaterial that Walker's perjury allegations (against both police and prosecutor), viewed *by themselves*, likely would not suffice under the *Leatherman* standard. Walker's core "District Attorney" *Brady* allegations are more than enough to sustain his complaint.

II.

WHETHER THE KINGS COUNTY DISTRICT ATTORNEY ACTED AS A CITY POLICYMAKER IS AN INAPPROPRIATE QUESTION FOR REVIEW BY THIS COURT.

The determination of whether the Kings County District Attorney acted as a municipal policymaker raises no federal question. "[W]hether a particular official has 'final policymaking authority' is a question of state law." *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). And this Court "generally accord[s] great deference to the interpretation and application of state law by the courts of appeals." *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n. 13 (1986), citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815, n. 12 (1984); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

A. The Second Circuit Correctly Interpreted New York Law As ToThe District Attorney's Status.

It is beyond dispute that the Kings County District Attorney is a county functionary. More than ten years ago, in *Kelley v. McGee*, 57 N.Y.2d 522, 533-36 & n. 12, 457 N.Y.S.2d 434, 437-39 & n. 12 (1982), New York's highest court squarely and definitively held that "a District Attorney should no longer be considered a 'state officer,' " but rather must be classified as a *county* officer.

It follows, as New York has decreed by statute, *see* N.Y. County L. §§ 53(1), 941, that Kings County — and hence New York City[6] — is liable for the torts of the Kings County District

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6. A liability of one of New York City's constituent counties is a liability of the City itself. *See Jones v. Queens County*, 1991 WL 37083, at *1 (E.D.N.Y. Mar. 19, 1991) ("city . . . subdivisions such as Queens County are (Cont'd)

Attorney. *See, e.g., Murph v. State of New York*, 98 Misc. 2d 324, 326, 413 N.Y.S.2d 854, 856 (Ct. Cls. 1979) ("Such liability as may exist for acts [of district attorneys] devolves upon the governmental subdivision which employs them, in this case the City of New York"); *Drake v. City of Rochester*, 96 Misc. 2d 86, 94-97, 408 N.Y.S.2d 847, 853-55 (Sup. Ct., Monroe Co. 1978), *aff'd on opin. below*, 74 A.D.2d 996, 429 N.Y.S.2d 394 (4th Dep't 1980) ("the county may be liable for acts of an assistant district attorney . . . if those acts are outside both the absolute immunity of quasi-judicial activity and the qualified immunity of investigatory activity"); *Rosen & Bardunias v. County of Westchester*, 158 A.D.2d 679, 680, 552 N.Y.S.2d 134, 136 (2d Dep't 1990), *app. denied* 76 N.Y.2d 703, 559 N.Y.S.2d 482, *rearg. denied*, 76 N.Y.2d 889, 561 N.Y.S.2d 550 (1990), *cert. denied*, 111 S. Ct. 962 (1991) (citing with approval *Drake, supra*, in holding proper the denial of Westchester County's motion for summary judgment on claims arising out of an assistant district attorney's investigative involvement in the execution of a search warrant); *see also Johnson v. Town of Colonie*, 102 A.D.2d 925, 926, 477 N.Y.S.2d 513, 514 (3d Dep't 1984).[7]

(Cont'd)
not subject to lawsuits in their own names, but only in the name of the City of New York"); *Zimmerman v. City of New York*, 52 Misc. 2d 797, 799, 276 N.Y.S.2d 711, 714 (Sup. Ct., N.Y. Co., 1966) (whether defendant New York *County* had been properly served was of "no consequence," since defendant New York *City* had appeared and county was subdivision of city); *Fisher v. State*, 23 Misc. 2d 935, 936, 203 N.Y.S.2d 363, 364 (Ct. Cls. 1959), *aff'd*, 13 A.D.2d 608, 212 N.Y.S.2d 209 (3d Dep't), *aff'd*, 10 N.Y.2d 60, 217 N.Y.S.2d 52 (1961) (suggesting New York City's liability, under County L. § 53, for district attorney torts); N.Y.C. Admin. Code § 7-110 (providing for City indemnification of district-attorney personnel, and for representation of such personnel by the City Corporation Counsel, pursuant to N.Y. Gen. Munic. L. § 50-k).

7. The Third Department held in *Johnson* that common-law claims predicated upon district attorney misconduct will lie against the involved county "on a theory of *respondeat superior*." The Court nevertheless upheld, on other grounds (immunity and existence of warrant), dismissal of the particular
(Cont'd)

B. The District Attorney Is A City Policymaker.

Petitioner further argues that, because the City purportedly has no control over how the Kings County District Attorney runs his office, the Second Circuit's holding contravenes this Court's decisions in *Monell*, *Pembaur* and *Praprotnik*. Pet. 18. The argument is unfounded and incorrect.

There is, to begin with, no foundation for the City's proposition that it does not "control" the Kings County District Attorney. As Walker has alleged (Complaint ¶ 35), that official is *paid* by the City. Accordingly, the City must be assumed here to have the ability to assure that the District Attorney will properly train and supervise his Assistants.[8]

Second, the Kings County District Attorney is no less a City functionary simply because his writ runs through but one of the City's five constituent counties. The Kings County District Attorney effectively acts as the *City's policymaker for Kings County* in all matters of prosecutorial training and supervision. And, as has been set forth above, it is settled New York law that the State's counties — and hence New York City, as to *its* counties — are responsible for the torts of their district attorneys. *See* Point II.A above.

Further, the City's "no control" argument is refuted by *Pembaur* itself. The Sixth Circuit in *Pembaur* specifically rejected

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(Cont'd)
common-law claims before it. *Id.* The court further upheld dismissal of a 1983 cause of action — but solely because plaintiff Johnson had pleaded nothing but a *respondeat superior* case on that claim as well, failing to allege any culpable *municipal* conduct. *Id.*

8. As to the District Attorney's status as a City "agent," *see generally* the City Corporation Counsel opinions set forth as Appendices B and C hereto.

the district court's holding "that the County could not be held liable for the policies of the Sheriff [an elected official] because the Sheriff was not subject to the control of the Board of Commissioners . . ., the County's governing body." *Pembaur v. City of Cincinnati*, 746 F.2d 337, 340 (6th Cir. 1984), *rev'd*, 475 U.S. 469 (1986). Nor did this Court question the Sixth Circuit's conclusion "that . . . the County Sheriff . . . could establish county policy under appropriate circumstances." *Pembaur*, 475 U.S. at 484. *See also, e.g., Crane v. Texas*, 759 F.2d 412, 429-30 (5th Cir.), *reh. denied en banc*, 766 F.2d 193, 194-95, *cert. denied*, 474 U.S. 1020 (1985) (Texas district attorney had sole responsibility for county's capias system and thus constituted county "policy maker"; even though district attorney had numerous minor attributes of state official, he constituted county official for 1983 purposes since he was elected by county's voters, was paid by county funds and was limited to the county in exercising his state-derived powers); *Parker v. Williams*, 862 F.2d 1471, 1477-81 & n.10 (11th Cir. 1989) (notwithstanding that Alabama sheriff was characterized as a state employee under Alabama law and that, as an elected official, he operated with "considerable autonomy from the county," *id.* at 1481 n. 10, county could have 1983 liability for injury caused by sheriff's policy of inadequate pre-hiring background checks, since sheriff in fact exercised final hiring authority for county's jail); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (Massachusetts county had 1983 liability for consequences of sheriff's strip-search policy where sheriff was responsible under state law for security policy in county correction facilities: "the sheriff was the county official who was elected by the County's voters to act for them and exercise the powers created by state law. Accordingly, the sheriff's strip search policy *was* Plymouth County's policy . . . .") (emphasis original); *Overbay v. Lilliman*, 572 F. Supp. 174, 175-77 (W.D. Mo. 1983) (sustaining 1983 failure-to-train claim against county despite fact that, as elected official, sheriff was "only responsible to the voters": "[I]t is the sheriff who sets the rules and regulations —the policy — for the

sheriff's office. As chief law enforcement officer of the county those policies become the policies of the county." *Id.* at 177).

Finally, there is nothing amiss with the Second Circuit's conclusion here (20-21) that a New York district attorney acts as a county (City) policymaker in administering his office, even though he may wear the State's mantle when engaged in actual "prosecutorial acts." *Compare Gentile v. County of Suffolk*, 926 F.2d 142, 152 n. 5 (2d Cir. 1991), *with Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir. 1988), *cert. denied*, 488 U.S. 1014 (1989). *See also Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989) (prosecutorial acts of district attorney do not give rise to county liability under Section 1983; "an official may simultaneously exercise county authority over some matters and state authority over others," *id.* at 952); *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir. 1985) (Texas county had 1983 liability for County Treasurer's decision to fire employee: "Whatever state duties a County Treasurer may have, . . . in the personnel matters at issue here, Gray was wearing his county hat"); *Crane v. Texas, supra; Parker v. Williams, supra.*

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Dated: February 2, 1993

APPENDIX A — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK DATED JUNE 6, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

91 Civ. No. 2327 (JSM)

JAMES WALKER,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiff James Walker, on knowledge as to himself and matters in which he was directly involved and otherwise upon information and belief, alleges as follows:

JURISDICTION, VENUE AND JURY DEMAND

1. Plaintiff is a New York State citizen and a resident of the Southern District of New York.

2. Defendant The City of New York (the "City") is a municipal corporation of the State of New York and is a resident of the Southern District of New York.

3. This action arises under 42 U.S.C. § 1983 and under the common law of New York. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343 and by principles of pendent jurisidiction. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

4. On September 18, 1990, plaintiff duly served notice of the present claims pursuant to New York General Municipal Law § 50-e. More than thirty days have elapsed since such service without adjustment or payment of the claims.

5. Plaintiff demands trial by jury of all issues in this action.

FACTS PERTINENT TO ALL CLAIMS

6. At about 10:00 A.M. on June 1, 1970, at least two men robbed an armored truck delivering cash to a check-cashing facility operated by Edward Kargman ("Kargman") at 1834 Fulton Street, Brooklyn, New York (the "Robbery"). Kargman, who had been driving the truck, was shot during the Robbery; he died on or about June 10, 1970. (The Robbery and the felony murder of Kargman (the "Murder") are hereinafter referred to as the "Crimes".)

7. One of the men who committed the Crimes was William Powell ("Criminal Powell"). In October 1971, in New York State Supreme Court, Kings County (the "Trial Court"), Criminal Powell pleaded guilty to the Murder under Kings County Indictment No. 3786/71 (the "Indictment"), which charged him and plaintiff with the Crimes. As Criminal Powell admitted upon his plea, it was he who shot Kargman during the Robbery.

8. Another man involved in the Crimes (the "Shotgun Man")

used a sawed-off shotgun to knock unconscious Jose Ruiz ("Ruiz"), a guard who was accompanying Kargman and assisting with the delivery of cash.

9. The Crimes were investigated and prosecuted by the City's Police Department (the "Police Department") and by the Office of the District Attorney of Kings County (the "District Attorney"). Detective Robert A. Powell, Shield #2466, 77th Precinct ("Detective Powell"), had charge of the investigation for the Police Department. Assistant District Attorney J. Paul Zsuffa ("Zsuffa"), assigned to the District Attorney's Investigation Bureau, had charge of the investigation for the District Attorney's Office.

10. Several months after the Crimes, in or about Fall 1970, one John Snider ("Snider"), who claimed to have been an eyewitness to the Crimes, informed Detective Powell (and other police personnel) that plaintiff was the Shotgun Man. Snider further alleged that one Melvin Givens ("Givens") had also participated in the Crimes. Snider's allegations were made known to Zsuffa in or before April 1971.

11. At the time of the Crimes, both plaintiff and Givens were known to Snider as individuals who frequented the general neighborhood in which the Kargman check-cashing facility was situated. Further, Snider had on occasion seen plaintiff and Givens together in that neighborhood, and he believed them to be good friends (as was the case).

12. At all relevant times, Snider was a long-term drug addict with a significant criminal record. Snider was principally motivated to go to the police with his accusation of plaintiff and Givens by the prospect of sharing in a substantial reward (the "Reward"). Kargan's widow began offering the Reward in the summer of 1970.

Appendix A

13. Detective Powell and Zsuffa, as well as other police and prosecutorial personnel, were aware by no later than April 1971 of the facts alleged in paragraph "12" above.

14. In mid-April 1971, Criminal Powell was arrested and charged with the Crimes. At that point, the authorities still had no evidence implicating plaintiff in the Crimes other than Snider's purported eyewitness identification. Nor did they develop any such evidence thereafter.

15. On April 16, 1971, Zsuffa (with Detective Powell and two other Police Department detectives present) took a formal "Q and A" statement from Snider (the "April 16 Snider Statement"). In the April 16 Snider Statement, Snider repeated his accusation that both plaintiff and Givens had participated in the Crimes.

16. On April 23, 1971, Detective Powell arrested plaintiff for the Crimes. At that time, Detective Powell and other City police officers searched plaintiff's residence for evidence linking plaintiff to the Crimes. They found no such evidence.

17. On the evening of April 23, 1971, a lineup containing plaintiff and several others was conducted at the 77th Precinct stationhouse (the "April 23 Lineup"). Crime victim Ruiz at that time identified a lineup participant *other than plaintiff* as the Shotgun Man (hereinafter, the "Ruiz Identification"). Zsuffa and Detective Powell were immediately aware of the Ruiz Identification, and Zsuffa then and there took a formal "Q and A" statement from Ruiz concerning the same (the "Ruiz Lineup Statement").

18. By no later than April 23, 1971, moreover, Detective Powell, Zsuffa and other police and prosecutorial personnel had

additional grounds to believe that Snider's account of the Crimes might be unreliable: they had learned that Givens might have been incarcerated on the date of the Crimes. Zsuffa indeed prepared an official Investigation Bureau report dated April 23, 1971 (the "April 23 Report") which expressly noted the latter possibility.

19. Givens was in fact in the custody of the City's Department of Correction on the date of the Crimes. Givens accordingly could not have participated in the Crimes.

20. Shortly after April 23, 1971, Detective Powell, Zsuffa and other police and prosecutorial personnel involved in the investigation and prosecution of the Crimes learned the facts set forth in paragraph "19" above.

21. Upon learning those facts, Detective Powell and Zsuffa recognized, correctly, that Sider's wholly-uncorroborated accusation of plaintiff could no longer be credited, and that any pre-existing probable cause to prosecute plaintiff for the Crimes had now been entirely dissipated.

22. Detective Powell and Zsuffa, having no other plausible suspects for the Shotgun Man and strongly desiring to "close the books" on the Crimes, thereupon began to conspire and to act in concert with each other, and with other police and prosecutorial personnel, to do whatever might be necessary, lawful or not, to secure plaintiff's conviction and imprisonment, guilty or not, for the Crimes (hereinafter, the "Conspiracy").

23. Throughout the period of the Conspiracy (which extended at least through mid-May 1990), Detective Powell, Zsuffa and the other Conspirators pursued the Conspiracy's objectives with actual malice toward plaintiff, with utter disregard

for plaintiff's rights under the Constitutions and laws of the United States and of the State of New York, and wholly without probable cause to believe plaintiff guilty of the Crimes.

24. It was a part of the Conspiracy that Zsuffa, Detective Powell and the other Conspirators (a) would do whatever was necessary, including but not limited to the commission and subornation of perjury, to conceal from plaintiff, from plaintiff's counsel, from the Kings County Grand Jury (the "Grand Jury"), and from the Trial Court, both the fact that Snider had falsely accused plaintiff's friend Givens of the Crimes and the fact of the Ruiz Identification (such facts hereinafter, collectively, the "Exculpatory Facts"), and (b) would hold Snider out to the Grand Jury and the Trial Court as truthful in his accusation of plaintiff, notwithstanding that the Conspirators actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that the latter accusation was false.

25. In mid-June 1971, in furtherance of the Conspiracy, Detective Powell, Zsuffa and another Assistant District Attorney ("ADA Doe", a Conspirator), whose name is unknown to plaintiff but who was assigned to the Indictment Bureau of the District Attorney's Office and had charge of presenting plaintiff's case to the Grand Jury, caused Snider to be arrested and jailed as a material witness. The Conspirators then persuaded Snider to join the Conspiracy; as a result, Snider's ensuing Grand Jury testimony deliberately omitted all mention of Givens, while continuing falsely to implicate plaintiff in the Crimes.

26. The Conspirators further saw to it that the Grand Jury did not in any way learn either of the Exculpatory Facts. By reason of the suppression of those Facts, and by reason of other Conspiratorial conduct, the Grand Jury was unable to make a fair

and reliable determination as to the existence of probable cause to charge plaintiff with the Crimes.

27. In or about late June 1971, the Grand Jury returned the Indictment charging plaintiff and Criminal Powell with the Crimes. Plaintiff would not have been so indicted if the Exculpatory Facts had been disclosed to the Grand Jury and if the Grand Jury proceedings had otherwise been conducted so as to achieve a fair and reliable probable-cause determination.

28. The Conspirators continued their active pursuit of the Conspiracy following the return of the Indictment. In so doing, they committed at least the additional overt acts described in subparagraphs (a)- (g) of this paragraph 28.

(a) In order to suppress the Ruiz Identification, Zsuffa testified falsely and perjuriously, at plaintiff's October 1971 *Wade* hearing, to the effect that the April 23 Lineup had never taken place.

(b) To the same end, and at the same hearing, Detective Powell testified falsely and perjuriously to the effect that he had no recollection of the April 23 Lineup and that he knew of no records of that Lineup.

(c) Further to the same end, Assistant District Attorney Benjamin Schmier ("Schmier"), the Assistant who conducted plaintiff's *Wade* hearing and immediately-ensuing trial (and who himself was a Conspirator), deliberately failed to correct the foregoing Zsuffa-Powell testimony, despite his knowledge of its falsity.

(d) Notwithstanding the Trial Court's entry of a September 1971 order requiring disclosure of material favorable to the

defense, the Conspirators deliberately withheld from plaintiff and his trial counsel police and prosecutorial documents reflecting the Exculpatory Facts, including but not limited to: the April 16 Snider Statement; the Ruiz Lineup Statement; the April 23 Report; all Police Department reports recording Snider's accusation of Givens; and the official photographs and stenographic minutes made for the District Attorney's Office, as well as all Police Department records, of the April 23 Lineup.

(e) Detective Powell, Zsuffa, Schmier and other police and prosecutorial Conspirators further saw to it, through continued violation of their own disclosure duties, through "trial preparation" of witnesses Snider and Ruiz, and otherwise, that the defense — as well as the Trial Court and the jury — did not learn of the Exculpatory Facts in any other way at plaintiff's trial.

(f) Schmier deliberately elicited Snider's testimony accusing plaintiff of the Crimes, at both the *Wade* hearing and the ensuing trial, notwithstanding that Schmier actually knew (or, but for a wanton and deliberate indifference to the truth, would have known) that that testimony was false and perjurious.

(g) Schmier and Detective Powell further collaborated in bad faith at trial to misleadingly bolster Snider's credibility in the eyes of the jury: without disclosing the details of what Snider had told him in the Fall of 1970 — *and thus without revealing Snider's false accusation of Givens* — Detective Powell pointedly conveyed to the jury, on direct examination by Schmier, that Snider's Fall 1970 story had been entirely consistent with his trial testimony in accusing *plaintiff* of the Crimes.

29. As a result of the foregoing, and as the Conspirators contemplated and intended, the Trial Court and the jury remained

wholly unaware (i) that plaintiff's sole accuser (Snider) had made a like, indisputably *false* accusation against plaintiff's good friend Givens; (ii) that Snider's accusation of plaintiff was also false and perjurious, and was known to be so by the prosecution; and (iii) that the single witness (Ruiz) best positioned to identify the Shotgun Man had actually identified someone *other* than plaintiff as that person.

30. It was a further part of the Conspiracy that neither the Police Department nor the District Attorney's Office would pursue any additional investigation into the identity of the Shotgun Man: once having decided to "nail" plaintiff as the Shotgun Man, Detective Powell, Zsuffa and their co-conspirators avoided any steps which might jeopardize that effort; they accordingly disregarded altogether their public duties to find and prosecute the real Shotgun Man, and the latter has never been identified or apprehended.

31. The Conspiracy achieved its objectives. On October 19, 1971, following and as a direct and proximate result of a *Wade* hearing and trial rendered grossly unfair by the above-described perjury and suppression of evidence, plaintiff was convicted of the Murder (the "Conviction"). On April 5, 1972, the Trial Court sentenced plaintiff on the Conviction to imprisonment for a term of 20 years to life (the "Sentence").

32. Many years after the Conviction, plaintiff obtained evidence of the Exculpatory Facts and of the authorities' complicity in suppressing the same. Plaintiff adduced that new evidence before the Trial Court on a post-conviction motion, and on May 16, 1990, the Trial Court entered an order vacating the Conviction.

33. On June 27, 1990, following a full review of the case against plaintiff, the District Attorney joined with plaintiff in a motion to dismiss the Indictment with prejudice. The Trial Court granted the motion in an order entered that day (the "Dismissal Order", a copy of which is attached as Exhibit 1 hereto). The Dismissal Order effected a "favorable termination" of plaintiff's prosecution under applicable law.

34. Detective Powell, Zsuffa, Schmier, ADA Doe and all other police and prosecutorial personnel who joined in the Conspiracy acted at all relevant times within the scopes of their respective employments with the Police Department and the District Attorney's Office.

35. The District Attorney at all relevant times was (and is) an elected officer of Kings County, one of the constituent counties of the City, and the District Attorney's Office was (and is) funded out of the City's budget. Further, the District Attorney was (and is) designated a "local officer," rather than a "state officer," under the New York Public Officers Law (section 2); and New York has provided by statute (N.Y. County L. §§ 53, 941) that the City's constituent counties (including Kings County), and hence the City itself, shall have liability for torts committed by County officers and employees such as the District Attorney and his Assistants.

36. Notwithstanding that he had no involvement whatever in the Crimes, plaintiff was continuously held in custody therefor from age 31 through age 50. Plaintiff has maliciously and unjustly been deprived of the best years of his life for someone else's crimes; he has been subjected to degrading, dehumanizing and emotionally destructive prison conditions, and has suffered shame, indignity, isolation from society, separation from friends and family, loss of consortium and loss of earnings. Plaintiff has been damaged thereby in an amount not less than $11,000,000.

Appendix A

FIRST CLAIM

37. Plaintiff repeats and realleges the allegations of paragraphs "1" through "36" above.

38. The aforesaid Conspiratorial conduct operated, *inter alia*, to deprive plaintiff of important and well-established rights under the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, including plaintiff's right not to be significantly detained pretrial except pursuant to a fair and reliable determination of probable cause, his right to be free from bad-faith prosecution, his right to confront the trial witnesses against him, his rights to a fair trial and to due process of law, and his right to be free from cruel and unusual punishment. Such misconduct also directly and proximately caused the Conviction, the Sentence and plaintiff's nineteen years of incarceration for the Murder.

39. The foregoing violations of plaintiff's Constitutional rights, and the Conviction, the Sentence and plaintiff's incarceration for the Crimes, were further directly and proximately caused by conduct, chargeable to defendant City, amounting to deliberate indifference to the Constitutional rights of persons coming into contact with the Police Department and the District Attorney's Office, *viz.*, (1) the institution and implementation of grossly and recklessly or deliberately inadequate policies, procedures and regulations of the defendant City, of the Police Department, and of the District Attorney's Office, respecting the safeguarding of the Constitutional rights of accused persons, the truthfulness of testimony to be offered for the prosecution in criminal cases, the handling and disclosure of exculpatory evidence, the proper and competent conduct of criminal investigations and the avoidance of unjust convictions, and/or (2) a gross and reckless or deliberate failure by the defendant City, by

the Police Department, and by the District Attorney's Office, to properly instruct, train and supervise police and prosecutorial personnel as to such matters. In particular, and among other things:

(a) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting (i) the proper handling of exculpatory information and, more generally, the protection of Constitutional rights of accused persons; (ii) the proper handling of pretrial statements of prosecution witnesses; and (iii) the basic duty of the police, as an investigative agency, to pursue not only the conviction of the guilty but the exoneration of the innocent.

(b) The Police Department at all relevant times had no written policies, procedures or practice guides, and gave no training or wantonly insufficient training to its personnel (including Detective Powell), respecting the proper working relationship between the Police Department and the District Attorney's Office in criminal investigations and prosecutions. The Police Department's deficiencies in this respect included, but were not limited to, a failure to give appropriate guidance to its personnel as to how to respond if confronted by unlawful, unconstitutional or otherwise improper conduct on the part of District Attorney's Office personnel in the course of such investigations or prosecutions.

(c) The Police Department at all relevant times wantonly failed to sufficiently and appropriately train and instruct its personnel (including Detective Powell) as to their duties to be truthful and accurate when giving testimony themselves and to seek only such testimony from non-Police witnesses.

(d) Through the time of plaintiff's trial, the District

Attorney's Office had no training program of any significance for incoming Assistant District Attorneys. By reason of that blatant deficiency, and otherwise, the Office wantonly failed to appropriately train and instruct Zsuffa, Schmier, ADA Doe and other Assistants as to, *inter alia,* (i) their obligations to recognize and disclose exculpatory information and to avoid the use of perjured evidence; (ii) their obligations otherwise to safeguard and protect the Constitutional rights of accused persons; and (iii) their fundamental duty as prosecutors to avoid unjust convictions (even at the expense of "losing" cases).

(e) The District Attorney's Office at the time of plaintiff's trial had no written policies, procedures or practice guides concerning (i) the prosecutor's duty to disclose exculpatory material, (ii) the prosecutor's duty to disclose pretrial statements of prosecution witnesses, or (iii) the prosecutor's duty to avoid the introduction of perjured evidence.

(f) The District Attorney's Office failed, until at least two years after plaintiff's trial, to institute any system for active supervision of trial Assistants by competent supervisors.

(g) The resultant absence of supervision was particularly critical as to the handling of exculpatory information uncovered by police and prosecutorial personnel, as the District Attorney's Office itself has now belatedly acknowledged: it is now, but was not in 1971, required procedure for trial Assistants in that Office to consult with supervisors as to the need to disclose exculpatory information to the defense.

(h) The District Attorney's Office at all relevant times lacked any practice to review the quality of the job performance of Assistant District Attorneys in any fashion that would disclose

whether the Assistants were properly discharging their obligations to disclose exculpatory material and not to adduce perjured testimony.

(i) The District Attorney's Office in 1971 was an extremely high-volume operation which permitted Assistant District Attorneys to devote only a limited amount of time to any particular case. As was obvious at the time, this circumstance made it all the more critical that Assistants receive proper training and supervision in such important matters as the need to recognize and disclose exculpatory information.

(j) The Police Department's deficiencies set forth in subparagraphs (a)-(c) of this paragraph 39 and the District Attorney's Office's deficiencies set forth in subparagraphs (e)-(i) of this paragraph 39 were collectively, and each such deficiency was individually, a substantial factor in bringing about the aforesaid violations of plaintiff's Constitutional rights.

40. At all relevant times, there was no personal animosity of any sort between plaintiff and any of the police or prosecutorial Conspirators. Indeed, plaintiff had had no contact whatever with any of such Conspirators prior to his arrest for the Crimes. Under the circumstances, conduct like the Conspirational conduct complained of herein would not ordinarily have occurred in the absence of gross and wanton deficiencies in police and prosecutorial training and supervision.

41. The City's Police Commissioner, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to the Police Department's

performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the City's Police Commissioner (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifferenee to the Constitutional rights of persons coming into contact with the Police Department.

42. The District Attorney, personally and/or through his authorized delegates, at all relevant times had final, discretionary authority to promulgate and implement policies and procedures, including policies and procedures as to personnel training and supervision, with respect to his Office's performance of its duties. Under the principles of municipal liability for federal civil-rights violations, the District Attorney (and/or his authorized delegates) constituted a City "policy maker" and owed plaintiff and the public a duty, breached in this case, to avoid deliberate indifference to the Constitutional rights of persons coming into contact with his Office.

43. The foregoing violations of plaintiff's Constitutional rights constituted Constitutional torts and were effected by actions undertaken under color of law, statutes and regulations of the State of New York.

44. By reason of the foregoing, defendant is liable to plaintiff, pursuant to 42 U.S.C. § 1983, an amount not less that $11,000,000.

SECOND CLAIM

45. Plaintiff repeats and realleges the allegations of paragraph "1" through "36" above.

46. At all relevant times, Detective Powell, Zsuffa, Schmier,

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ADA Doe and the other Conspirators prosecuted plaintiff with actual malice and without probable cause to believe plaintiff guilty of the Crimes.

47. The City is responsible for the Conspirators' misconduct under principles of *respondeat superior.*

48. By virtue of the foregoing, defendant is liable to plaintiff, pursuant to the New York law of malicious prosecution, in an amount not less than $11,000,000.

WHEREFORE, plaintiff demands TRIAL BY JURY of all issues in this action, and further demands JUDGMENT against defendant as follows:

I. For compensatory damages in an amount not less than $11,000,000.

II. For reasonable attorneys' fees, together with costs and disbursements, pursuant to 42 U.S.C. § 1988 and to the inherent powers of this Court.

III. For pre-judgment interest as allowed by law.

IV. For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 6, 1991

Appendix A

Respectfully submitted,

s/ DS Liebhafsky
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Attorneys for Plaintiff

APPENDIX B – CITY CORPORATION COUNSEL'S OPINION NO. 4-83 DATED MAY 13, 1983

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

FREDERICK A. O. SCHWARZ, JR
Corporation Counsel

(212) 566-

Opinion No. 4-83
May 13, 1983

Hon. Elizabeth Holtzman
District Attorney, Kings County

Hon. Mario Merola
District Attorney, Bronx County

Hon. Robert M. Morgenthau
District Attorney, New York County

Hon. William L. Murphy
District Attorney, Richmond County

Hon. John J. Santucci
District Attorney, Queens County

Dear District Attorneys:

This opinion is written in response to the request by some of the district attorneys to confirm the advice of this office that the

district attorneys in the five counties which comprise the City of New York are entitled to be represented in civil actions and proceedings by the Corporation Counsel and indemnified by the City of New York pursuant to the terms and conditions set forth in § 50-k of the General Municipal Law.

District attorneys, members of their staffs and authorized volunteers are employees of the City for the purpose of § 50-k, which provides for the representation and indemnification of employees of City agencies in civil actions and proceedings. Paragraph e of subdivision one of § 50-k defines "employee" for the purposes of that section to mean:

> "any person holding a position by election, appointment or employment in the service of any agency, whether or not compensated, or a volunteer expressly authorized to participate in a city sponsored volunteer program, but shall not include an independent contractor."

Paragraph a of that subdivision defines "agency" for the purposes of § 50-k to include:

> "a city, *county*, borough or other *office* . . . the expense of which are paid for in whole or in part from the city treasury. . . ." (Emphasis added).

Thus to be covered by the provisions of § 50-k, a person must be an employee of an "agency", as the term is defined in that section. The office of district attorney meets that definition: (1) The expenses of the office of a district attorney "are paid for in whole or in part from the city treasury", and (2) as the provisions of

the State Constitution and the statutes and cases cited and discussed below demonstrate conclusively, the office of district attorney is a county office.

Turning first to the State Constitution, Act. XIII, § 13, subd. a, provides in relevant part:

> "Except in counties in the city of New York and except as authorized in section one of article nine of this constitution, . . . district attorneys . . . shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require . . . . In each county in the city of New York a district attorney shall be chosen by the electors once in every two or four years as the legislature shall direct."

Subdivision c of § 13 refers to a district attorney in the City of New York in terms that clearly indicate that the office is a county office:

> "The city of New York is hereby vested with power from time to time to abolish by local law, as defined by the legislature, *the office of any county officer within the city other than . . . district attorneys*, and to assign any or all functions of such officers to city officers. . . . " (Emphasis added.)

That the district attorneys are county officers was recognized by the Court of Appeals in *Kelly v. McGee*, 57 NY2d 522, 536 n. 12 (1982), wherein the Court stated:

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> "It is certainly worthy of note that the only specific reference in the Constitution to the nature of District Attorney as State or local is phrased in terms implicitly recognizing its character as local, or county, in nature."

In *Kelly*, the Court considered whether district attorneys are subject to the provisions of Article XIII, § 7 of the State Constitution, which prohibits mid-term increases or decreases in the compensation of "state officers named in this constitution". The Court concluded that when this proscription was adopted:

> "the District Attorney was considered a State officer within the meaning of section 7 of article XIII, notwithstanding the fact that, for other purposes, the office was deemed local in nature (e.g., *Fisher v State of New York*, 10 NY2d 60 [District Attorney is not a State officer within the meaning of section 2 of the Public Officers Law so as to render the State liable for his tortious conduct]; *Ritter v State of New York*, 283 App. Div. 833 [same]; see *Burke v Kern*, 287 NY 203, 212 [Sheriff is a county officer, although also a State officer for some purposes]; *Matter of Miller v State of New York*, 279 NY 74, 77 [county register and employees of that office are not in State service for purpose of Workers' Compensation Law]). *We conclude, however, that more recent constitutional developments have operated to remove this office from its previous constitutional stature and that a District Attorney may no longer properly be considered*

> *a State officer.*" 57 NY2d at 534. (Emphasis added).

Further, a district attorney, who is elected in New York City and elsewhere in the State on a county-wide basis (N.Y. Const., Art. XIII, § 13, subd. a; County Law, § 926), and whose duty it is to prosecute all "crimes and offenses cognizable by the courts of the county for which he shall have been elected" (County Law, §§ 700, 927), is a local officer under the terms of § 2 of the Public Officers Law. That section distinguishes between a state officer" and a "local officer" in the following manner:

> "The term 'state officer' includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States. *The term 'local officer' includes every other officer who is elected by the electors of a portion only of the state, subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state.* The office of a state officer is a state office. The office of a local officer is a local office." (Emphasis added).

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Accordingly, on the basis of the relevant constitutional, statutory and case law, it is the opinion of this office that the office of district attorney in each of the counties comprising the City of New York is an agency of the City for the purposes of § 50-k of the General Muncipal Law, and, therefore, district attorneys, members of their staffs and authorized volunteers are entitled to be represented by the Corporation Counsel and indemnified by the City in accordance with the terms and conditions set forth in § 50-k.

Sincerely,

Frederick A. O. Schwarz, Jr.
Corporation Counsel

APPENDIX C — CITY CORPORATION COUNSEL'S OPINION NO. 31-84 DATED SEPTEMBER 10, 1984

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel

(212) 566-4515

Opinion No. 31-84
September 10, 1984

Hon. Powell Pierpoint
Chair
Board of Ethics

Dear Mr. Pierpoint:

This letter is in response to an opinion request, dated April 2, 1984, from Judith Grad, Counsel, asking whether district attorneys within the City of New York and members of their staffs are subject to the ethics provisions set forth in Chapter 68 of the New York City Charter (§ 2600 *et seq.*).

As you are aware, Chapter 68 of the Charter establishes the Board of Ethics and sets forth its powers. Section 2602(a) of that chapter directs the Board to render advisory opinions with respect to questions of ethical conduct, conflicts of interests and other matters under the provisions of Chapter 68. That chapter applies to any officer or employee of the city or of any city agency.* The term

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* The applicability of § 2606 differs slightly from that of other sections in that it pertains to an "officer or employee of the city".

"agency" is defined in § 2604(e) as:

> "a city, *county*, borough or other *office*, position, administration, department, division, bureau, board, commission, authority, corporation or other agency of government, the expenses of which are paid in whole or in part from, the city treasury, and shall include the board of education, the board of higher education, school boards, city and community colleges, community boards, the New York city transit authority, the New York city housing authority, and the triborough bridge and tunnel authority, but shall not include any court of any corporation or institution maintaining or operating a public library, museum, botanical garden, arboretum, tomb, memorial building, aquarium, zoological garden or similar facility." (Emphasis added).

A district attorney is elected in New York City, as well as elsewhere in the state on a county-wide basis, and the expenses of the office of district attorney "are paid in whole or in part from the city treasury."* Therefore, in accordance with the definition of "agency" contained in § 2604 (e) and for the additional reasons discussed herein, it is our opinion that the office of district attorney is clearly a "county office" and an "agency" as defined in § 2604(e), and is thus subject to the provisions of Chapter 68.

In Opinion No. 4-83, dated May 13, 1983, this office

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* According to the Office of Management and Budget, the City funds 80 per cent of the budgets of district attorneys on a city-wide average basis.

concluded that the office of district attorney in each of the counties comprising the City of New York is an agency of the City for the purposes of § 50-k of the General Municipal Law. Pursuant to this section, district attorneys, members of their staffs and authorized volunteers are entitled to be represented and indemnified by the City under the conditions set forth therein. The definition of "agency" as used in the ethics provisions of the Charter is substantially identical to that in § 50-K.

The Court of Appeals has held that district attorneys are local officers. In *Kelly v. McGee*, 57 NY 2d 522 (1982), the Court considered whether district attorneys are subject to the provisions of Article XIII, § 7 of the State Constitution which prohibits mid-term changes in the compensation of "state officers named in this constitution". The Court concluded that although district attorneys were considered State officers at the time when Article XIII, § 7 of the State Constitution was adopted, subsequent amendments to the Constitution had given county governments greater authority "to adopt certain variations concerning the offices of District Attorney***" (57 NY 2d at 535). It observed at 57 NY 2d 534-536:

> "*** more recent constitutional developments have operated to remove this office from its previous constitutional stature and that a District Attorney may no longer properly be considered a State officer.
>
> * * *
>
> Indeed, we believe that under the present constitutional framework, the characterization of a District Attorney as a State officer is conceptually incompatible with the broad

> authority afforded counties over their local offices by the home rule provisions [contained in the State Constitution]."

In a footnote to the above quote (57 NY2d 536 n. 12), the Court noted additionally:

> "This conclusion is further buttressed by the language of article XIII (§ 13, subd. [c]) of the Constitution, which states that the City of New York may abolish the 'office of any county officer within the city other than judges, clerks of counties and district attorneys'. It is certainly worthy of note that the only specific reference in the Constitution to the nature of the office of District Attorney as State or local is phrased in terms implicitly recognizing its character as local, or county, in nature."

More recently, in *Carey v. Oswego County,* 91 AD 2d 62, 64 (1983), aff'd on op. below 59 NY2d 848 (1983), the Appellate Division Third Department stated:

> "The question of whether the office of District Attorney is a local office or State office was recently settled by the Court of Appeals in Matter of *Kelly v. McGee*, (57 NY2d 522, 534-535), where the court concluded that as a result of the 'significant change in the relationship between county and State governments brought about by the home rule provisions of our State Constitution', District Attorneys must be considered local officers."

Thus, it is clear that district attorneys, including those within the City of New York, are local officers.

Public officers and employees within the state on both the state and local levels are subject to statutory provisions regarding ethical conduct. Public Officers Law, § 73 sets forth restrictions on the business and professional activities of state officers and employees and party officers, and § 74 of that law establishes the State's Code of Ethics. Those sections apply to officers and employees of state agencies.* In view of the fact that district attorneys and the members of their staffs are not state officials, these provisions of the Public Officers Law are not applicable to them.

Article 18 of the General Municipal Law (§ 800 *et seq.*) sets forth the standards of ethical conduct for all officers and employees of counties, cities, towns, villages, school districts and other similar local entities outside of the City of New York. Even prior to the Court of Appeals decision in *Kelly*, the Attorney General and State Comptroller had determined that district attorneys outside of the City were local officers subject to the provisions of Article 18. (See 1972 Op. Atty. Gen. 205; 1966 Op. Atty. Gen. 80; Op. State Compt. No. 70-1059.) The City of New York as well as the counties and public agencies therein is specifically excluded from Article 18 presumably because the City

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* The term "agency" is defined in those sections as:

> "any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor."

has its own comprehensive ethics provisions regarding its officers and employees. By logical inference as well as by reference to the express provisions of Charter, § 2604(e) defining the term "agency", district attorneys within the City are subject to the City's ethics provisions contained in Charter 68 of the Chapter.*

Accordingly, it is the opinion of this office that district attorneys within the City of New York and their staffs are subject to the ethics provisions of the City Charter.

Sincerely,

Frederick A. O. Schwarz, Jr.
Corporation Counsel

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* County Law, § 700(8) directs that "the district attorney of a county having a population of more than one hundred thousand . . . shall give his whole time to his duties" and "shall not engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his duties as district attorney." The legislative history of this section indicates that it was enacted for the purpose of requiring district attorneys in counties with a population over 100,000 to devote their full time to their duties as district attorneys. (See Governor's Memorandum, 1969 *Legislative Annual* at 28.) This provision is in no way inconsistent with the provisions of Chapter 68 which, for the reasons expressed herein, also are applicable to the district attorneys within New York City.